FILE COPY

Office Supreme Court
JAN 6 19
CHARLES ELMORE

Nos. 79 and 80

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

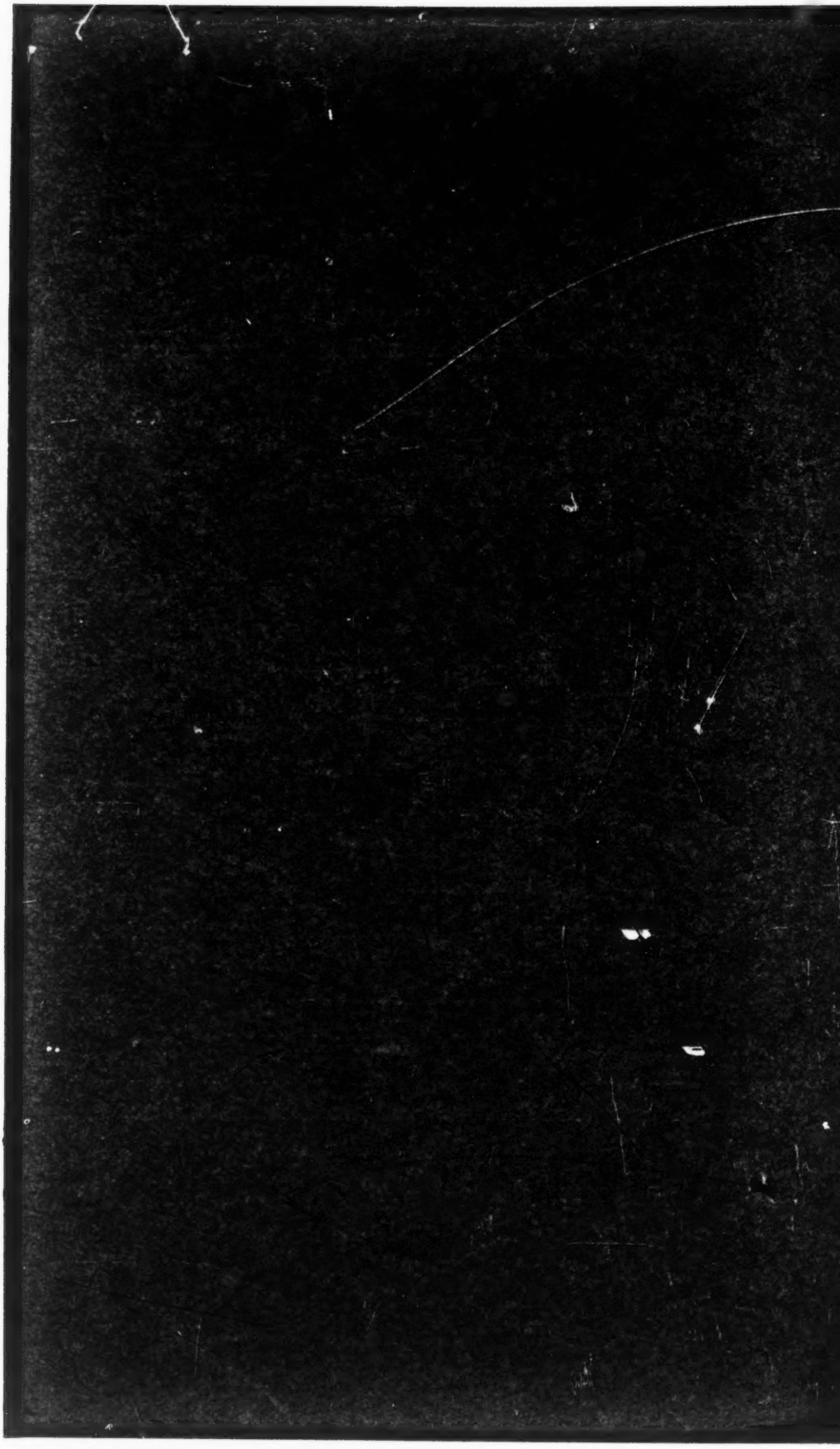
THE UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES



INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Specification of error	5
Summary of argument	5
Argument:	
I. The running of the period of the statute of limitations is started by the rejection of the claim for refund and not by the notice of the rejection	7
II. The legislative history indicates that the limitation period begins when the refund claim is rejected	11
III. The requirement that notice be given was substantially complied with	13
Conclusion	15

CITATIONS

Cases:	
Bowers v. *N. Y. & Albany Co.*, 273 U. S. 346	9
Connell v. *Hopkins*, 43 F. (2d) 773	14
Daily Pantagraph v. *United States*, 37 F. (2d) 783	14
Dupont de Nemours & Co. v. *Davis*, 264 U. S. 456	9
French v. *Edwards*, 13 Wall. 506	10
Girard Trust Co. v. *United States*, 270 U. S. 163	10
McKesson & Robbins v. *Edwards*, 38 F. (2d) 887	14
Mahoning Coal Ry. Co. v. *United States*, 28 F. (2d) 917	10
New Haven R. R. v. *Interstate Com. Com.*, 200 U. S. 361	14
United States v. *Updike*, 281 U. S. 489	9
United States v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310	9
United States v. *Whited & Wheless*, 246 U. S. 552	9
Utah Power & Light Co. v. *United States*, 243 U. S. 389	9
West Wisconsin Railway Co. v. *Foley*, 94 U. S. 100	8
Statutes:	
Act of March 4, 1923, c. 276, sec. 2, 42 Stat. 1504, 1505	7
Revenue act of 1924, c. 234, 43 Stat. 253, 343—	
Section 1014 (a) (U. S. C. Title 26, sec. 156)	7
Revenue act of 1926, c. 27, 44 Stat. 9, 116—	
Section 1113 (a) (U. S. C. App., title 26, sec. 156)	2, 3, 7
Miscellaneous:	
Senate Report No. 1137, 69th Cong., 4th sess	11, 12
House Report No. 1757, 67th Cong., 4th sess	12

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 79

THE UNITED STATES OF AMERICA, PETITIONER

v.

THEODORE MICHEL

No. 80

THE UNITED STATES OF AMERICA, PETITIONER

v.

LOUIS KRIEGER

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court for the Southern District of New York rendered no opinion. The opinion of the Circuit Court of Appeals (R. 7–11, 17–21) is reported in 37 F. (2d) 38.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered January 14, 1930. (R. 11, 21.) The

petition for writs of certiorari was filed April 12, 1930, and the writs were granted on May 19, 1930. (R. 22.) Jurisdiction is conferred upon this Court by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where the Commissioner of Internal Revenue does not notify a taxpayer within ninety days after the final rejection of a claim for refund, is an action brought more than five years after payment of the tax, and more than two years after the disallowance of the claim for refund, barred under the provisions of Section 3226 of the Revised Statutes as amended and reenacted in Section 1113 of the Revenue Act of 1926?

STATUTE INVOLVED

The Revenue Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156) provides in part:

> SEC. 1113. (a) Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue, ac-

cording to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained, whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum, unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail."

* * * * *

STATEMENT

The facts in these two cases are substantially the same. Respondents, who were partners doing business under the firm name of Michel & Krieger, brought actions in the District Court for the Southern District of New York to recover income taxes paid for the year 1919, alleging that the partnership income had been incorrectly determined because of overvaluation of closing inventory. (R. 1–3; 11–14.) In each case action was instituted more than five years after the taxes were paid and more than two years after the disallowance of claim for refund, but less than two years after notifica-

tion to the taxpayer that the claim had been officially rejected.

In the *Michel case* the complaint alleged: The taxpayer filed an income-tax return for the calendar year 1919 on March 15, 1920, and paid the tax shown to be due thereon in four instalments on March 15, June 15, September 15, and December 15 of that year; a claim for refund of a portion of the tax was filed on February 7, 1924; the taxpayer was notified by the Commissioner of Internal Revenue by letter dated August 17, 1925, that the claim for refund would be rejected and the rejection would officially appear on the next schedule to be approved by him (R. 1); the claim was so rejected by the Commissioner on September 2, 1925 (R. 2); and under the date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection (R. 1). Action in the District Court to recover the tax was begun subsequent to September 26, 1928. (R. 7.)

In the *Krieger case* the complaint alleged (R. 12): The taxpayer's return for 1919 was filed on March 15, 1920, and the tax shown to be due thereon was paid in four installments on March 15, June 15, September 15, and December 15, 1920; a claim for refund was filed September 15, 1924; on April 2, 1925, the taxpayer was advised by the Commissioner that the claim would be rejected and the rejection would appear on the next schedule to be approved by him; the claim was so re-

jected by the Commissioner on April 20, 1925; and under date of June 27, 1928, the Commissioner notified the taxpayer by letter of the rejection. Action in the District Court was begun subsequent to September 26, 1928. (R. 8.)

The District Court in each case granted a motion to dismiss on the ground that the complaint did not state facts sufficient to constitute a cause of action and entered judgment dismissing the complaint. (R. 4–5; 15.) On appeal the Circuit Court of Appeals reversed the judgments of the District Court, holding, by a divided court, that, although the actions were brought more than five years after the taxes were paid and more than two years after disallowance of the claims for refund, the statute of limitations had not run as the actions were instituted within two years after notification that the claims had been rejected.

SPECIFICATION OF ERROR

The Circuit Court of Appeals erred in holding that actions to recover taxes, begun more than five years after payment and more than two years after the disallowance of claims for refund, were not barred by Section 3226 of the Revised Statutes as amended.

SUMMARY OF ARGUMENT

I. The running of the period of the Statute of Limitations is started by the rejection of the claim for refund and not by the notice of the rejection. Section 3226 of the Revised Statutes, as amended,

provides that no suit to recover taxes illegally or erroneously collected shall be brought more than five years after the tax was paid, unless a claim for refund was filed, in which case the suit may be brought within two years after the claim for refund is rejected. It further provides that the Commissioner shall notify the taxpayer within ninety days after the disallowance of the claim for refund. The language of the statute as to the bringing of suits is unqualified, and we submit that the court below erred in reading into it an exception based on the Commissioner's failure to give the taxpayers formal notice of his rejection of their claims for refund.

II. The legislative history indicates that the limitation period begins when the refund claim is rejected. The committee reports refer to the bringing of suit within two years after the "disallowance" of the claim for refund. They fail to disclose any intention on the part of Congress that this period should be extended by the failure of the Commissioner of Internal Revenue to give notice of the rejection.

III. The requirement that notice be given was substantially complied with. The taxpayers were notified that their claims would be rejected a short time before the formal rejection of the claims. This was in accordance with the uniform practice of the Treasury Department, and we submit that it constituted a substantial compliance with the terms of the statute.

ARGUMENT

I

THE RUNNING OF THE PERIOD OF THE STATUTE OF LIMITATIONS IS STARTED BY THE REJECTION OF THE CLAIM FOR REFUND AND NOT BY THE NOTICE OF THE REJECTION

Prior to its amendment in 1923, Section 3226 of the Revised Statutes provided that no suit to recover taxes illegally or erroneously collected could be brought unless a claim for refund or credit of the tax had been filed. It further provided—

> No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum.

This section was amended by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, 1505, by inserting at the end of the matter just quoted the following—

> unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which such suit or proceeding relates. The Commissioner shall within 90 days after any such disallowance notify the taxpayer thereof by mail.

As so amended, Section 3226 was reenacted without change by Section 1014 (a) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 343 (U. S. C., Title 26, Sec. 156), and by Section 1113 (a) of the Revenue

Act of 1926, c. 27, 44 Stat. 9, 116 (U. S. C. App., Title 26, Sec. 156).

In the present cases neither action was brought within five years after payment of the tax nor within two years after the disallowance of the claim for refund. But the respondents contended, and the Circuit Court of Appeals held, that the actions were not barred because they were instituted within two years after notice that the claim for refund had been officially disallowed. The basis for the holding apparently was that the provision for notice contained in the amendment made by the Act of March 4, 1923, *supra*, was mandatory and that failure to give the notice prevented the running of the statute.

If, for the sake of argument, it be conceded that after the passage of the Act of March 4, 1923, *supra*, it was the duty of the Commissioner of Internal Revenue to notify taxpayers of the disallowance of claims for refunds,[1] it does not follow that the Commissioner's failure to comply with this requirement of the statute prevented the statute of limitations from running. The statute prescribed a duty, but it did not provide any consequence for the failure to perform that duty. The wording of the statute is plain. It provides that no suit can be brought more than five years after the payment of the tax, unless a claim for refund was filed and the suit is brought

[1]An argument to the contrary might be made. Cf. *West Wisconsin Railway Co.* v. *Foley*, 94 U. S. 100.

within two years after the disallowance of the claim. This language is unqualified, and we submit that the court below erred in reading into it an exception based on the Commissioner's failure to give the taxpayers formal notice of his rejection of their claims for refund.

The United States may not be sued without its consent. Where consent is extended by statute such a statute must be strictly construed in favor of the Government, especially as to the time for bringing suit. *United States* v. *Whited & Wheless*, 246 U. S. 552, 561; *Dupont de Nemours & Co.* v. *Davis*, 264 U. S. 456, 462.[2] If the giving of the notice specified in the amendment to Section 3226 is to be construed as a condition precedent to the running of the time for bringing suit against the Government, it follows that the Government has waived its right not to be bound by the negligence or default of its administrative officers. *Cf. United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S. 310, 314; *Utah Power & Light Co.* v. *United States*, 243 U. S. 389, 409. The Government should not be held to have waived any sovereign right or privilege un-

[2] We submit that the statements in *Bowers* v. *N. Y. & Albany Co.*, 273 U. S. 346, 350, and in *United States* v. *Updike*, 281 U. S. 489, 496, to the effect that provisions of limitation in taxing Acts are to be construed liberally in favor of the taxpayer, are not applicable here. The statutes discussed in these cases limited the right of the United States to bring proceedings. The statute under consideration limits the taxpayer's right to bring suit. It did not originate as part of a general taxing Act.

less it has plainly so provided. *Dupont de Nemours & Co.* v. *Davis,* 264 U. S. 456, 462, *supra.*

The effect of the decision of the court below is to construe the statute as though it provided that (1) if notice is given within ninety days, the limitation period expires two years after the date of rejection; (2) if no notice is given there is no period of limitations, as was held in *Mahoning Coal R. Co.* v. *United States,* 28 F. (2d) 917 (N. D. Ohio); and (3) if notice is given more than ninety days after the rejection, suit may thereafter be maintained, although the court does not point out what limitation, if any, is then imposed. This construction adopts the date of rejection as marking the beginning of the period of limitation in cases where notice is given within ninety days; in all other cases the date of the notice is apparently substituted for the date of rejection. It is submitted that the language of the statute does not permit such a substitution. Had Congress intended to make the giving of notice, rather than the act of rejection, the force that set the statute in motion, it could have made its purpose clear, and its failure to do so indicated a contrary intent. *Girard Trust Co.* v. *United States,* 270 U. S. 163, 169.

The court below relied on *French* v. *Edwards,* 13 Wall. 506. We submit that this decision is clearly distinguishable from the instant case on its facts. *French* v. *Edwards* involved the validity of a tax deed. It appeared that the statutes of California provided that the sheriff in selling property "shall

only sell the smallest quantity that any purchaser will take and pay the judgment and all costs." This Court held that the failure of the sheriff to comply with this statutory provision made the tax deed invalid. This was simply an application of the familiar rule that before a person can be divested of his property without his consent, all the statutory requirements must be strictly complied with. But the decision has no bearing on the question when the period of the Statute of Limitations begins to run. The statute involved in *French* v. *Edwards* operated to deprive a person of his property, while the statute involved in the instant case operated to extend to taxpayers the privilege of suing the United States in cases where that privilege did not exist before.

II

THE LEGISLATIVE HISTORY INDICATES THAT THE LIMITATION PERIOD BEGINS WHEN THE REFUND CLAIM IS REJECTED

The language here under consideration was added to Section 3226 of the Revised Statutes by Section 2 of the Act of March 4, 1923, c. 276, 42 Stat. 1504, *supra*. The original bill, from which this Act was derived, made no mention of Section 3226, but was confined to an amendment of Section 252 of the Revenue Act of 1921, relating to refunds. The amendment to Section 3226 was proposed by the Finance Committee of the Senate. The report of that committee reprints a brief which was pre-

sented to it, which contains the following language (Senate Report No. 1137, 67th Congress, 4th Session, p. 5):

> If the section be amended, as above suggested, the taxpayer will not have to start any suit until after it has been definitely determined that the bureau has disallowed his claim. He ought to have two years after such disallowance to begin that suit, because during that two years further negotiations with the bureau may result in the case being settled without suit.

The Finance Committee Report also referred to the amendment of Section 3226 as follows (p. 8):

> This is a new section amending section 3226 of the Revised Statutes to permit bringing suits within two years after the disallowance of a claim, the statute of limitations notwithstanding, and is recommended by the Treasury Department.

The suggested amendment was passed by the Senate. When the bill was sent to conference a slight change in the wording of the amendment was made. The Conference Report (House Report No. 1757, 67th Congress, 4th Session, p. 3) states:

> This amendment provides that a taxpayer may file suit for recovery of internal-revenue taxes within two years from the disallowance by the Commissioner of Internal Revenue of his claim therefor. The House recedes with an amendment making clerical changes.

None of these reports makes any reference to the notice to be given by the Commissioner. All of them refer to the bringing of suit within two years after the "disallowance" of the claim for refund. They indicate that Congress intended the date of rejection of the claim for refund as the date on which the period of limitations should start, and they fail to disclose any intention on the part of Congress that this period should be extended by the failure of the Commissioner of Internal Revenue to give notice of the rejection of the claim for refund.

III

THE REQUIREMENT THAT NOTICE BE GIVEN WAS SUBSTANTIALLY COMPLIED WITH

In the practice of the Treasury Department the official rejections of claims for refund have been recorded on schedules which were periodically approved by the Commissioner of Internal Revenue. Prior to some time in 1928 it was the practice of the Treasury Department to notify taxpayers of the determination of the Commissioner with respect to claims for refunds a short time prior to the official rejection of the claims, but it was not the practice to give further notice after the approval of the schedule.

The practice outlined above was followed in the instant case, and notice was sent to each respondent

advising him that his "claim for refund would be rejected and that this rejection would officially appear on the next schedule to be approved by" the Commissioner. (R. 1, 12.) The approval of the schedule occurred less than three weeks after the mailing of the notice. The giving of a notice in that form shortly before the rejection appeared on the official schedule has been held to be a sufficient compliance with the requirement of the statute. *Daily Pantagraph* v. *United States*, 37 F. (2d) 783, 788–789 (C. Cls.); *Connell* v. *Hopkins*, 43 F. (2d) 773, 776 (N. D. Tex.). Cf. *McKeeson & Robbins, Inc.*, v. *Edwards*, 38 F. (2d) 887, 888 (S. D. N. Y.).

While the practice outlined above was in effect Congress reenacted Section 3226 of the Revised Statutes, as amended, in the Revenue Act of 1924, and again in the Revenue Act of 1926. This reenactment shows congressional approval of the practice adopted by the Treasury Department. *New Haven R. R.* v. *Interstate Com. Com.*, 200 U. S. 361, 401–402. So uniform was the practice of the Treasury Department in this respect that we are informed by the Treasury Department that there are now outstanding 172,969 claims involving $2,017,716,241.52, which were rejected between January 1, 1922, and August 31, 1928, without notice having been given after the formal rejection of the claim for refund.

CONCLUSION

It is submitted that the decree of the Circuit Court of Appeals should be reversed.

Respectfully submitted.

WILLIAM D. MITCHELL,
Attorney General.
G. A. YOUNGQUIST,
Assistant Attorney General.
CLAUDE R. BRANCH,
SEWALL KEY,
JOHN H. McEVERS,
Special Assistants to the Attorney General..
ERWIN N. GRISWOLD,
Attorney.

JANUARY, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931